IN RE SUBRAMANIAM SANASI & ORS.

HIGH COURT MALAYA, MELAKA
WAN YAHYA J
[CRIMINAL REVISION NO. 2 OF 1981]
1 JUNE 1981

CRIMINAL LAW AND PROCEDURE: *Jurisdiction of Magistrate - Offence uder ss. 392, 397 Penal Code - Whether s. 397 a substantive offence - Whether Magistrate has power to transfer case to Sessions Court.*

On 10 January 1980 one Subramaniam s/o Sanasi (accused No. 1) was charged with 2 others for an offence of armed robbery before the learned Magistrate, Alor Gajah. He pleaded guilty and was sentenced to 30 months' imprisonment on the same day. The case against the other two accused was fixed for mention on 24 January 1980 as they claimed trial. However, when their case came up for hearing the learned Magistrate subsequently took the view that he had no jurisdiction to try an offence under ss. 392 & 397 of the Penal Code and ordered both the accused to be produced and dealt with by the President, Sessions Court, Melaka. The learned Magistrate's fears about his jurisdiction arose from the inclusion of s. 397 to the charge as he felt that s. 85 of the Subordinate Courts Act 1948 merely gave him the jurisdiction to try an offence under s. 392 and he could not dispose of a charge where, besides s. 392, the accused is also charged under s. 397. He made no order or took any steps to remedy the situation in respect of the 1st accused. The learned President of the Sessions Court, however, held a differing view - hence this reference.

Held:

[1] By an amendment to the Subordinate Courts Act 1948 *vide* Act A434/78 effective from 1 July 1978, the new s. 85 gave jurisdiction to Magistrates to try all offences for which the maximum term of imprisonment provided does not exceed 10 years or offences punishable with fine only. The latest amendment, *vide* Act A459/79 effective from 1 October 1979 made a further addition to the list of two specific offences namely ss. 392 & 457 of the Penal Code.

[2] Section 397 is not a substantive offence and when read with another section, serves merely as a rider to that offence and the effect of which is to enhance the maximum punishment. Under no circumstances can a person be charged under s. 397 alone.

[3] The effect of the increased permissible punishment imported into s. 392 by s. 397 does not take away the jurisdiction of a Magistrate to try the offence.

[4] As the provision to s. 85 of the Subordinate Courts Act had been left out in the amendment Act A434/78, a Magistrate no longer possesses the power to transfer cases to the Sessions Court.

[Conviction and sentence on 1st accused confirmed. Charges against other two accused to be dealt with by the learned Magistrate.]

Case referred to:
Tan Chew Man v. Public Prosecutor [1977] 2 MLJ 247

Legislation referred to:
Criminal Procedure Code (Cap 6), s. 177
Penal Code, ss. 325, 380, 381, 392, 397, 407, 408, 429, 431, 432, 435, 451, 452, 454, 457
Subordinate Courts Act, 1948 ss. 8, 87

For the public prosecutor - C.W. Chan; DPP
For the 2nd & 3rd accused - P. Devadas

JUDGMENT

Wan Yahya J:

On 10 January 1980 Subramaniam s/o Sanasi (accused No. 1), V. Balakrishnan s/o Veerasamy (accused No. 2) and Jayaraman s/o Balakrishnan (accused No. 3) were charged for an offence of armed robbery before the learned Magistrate at Alor Gajah, Melaka. Subramaniam s/o Sanasi pleaded guilty and was dealt with and sentenced to 30 months' imprisonment by the learned Magistrate on the same day. V. Balakrishnan s/o Veerasamy and Jayaraman s/o Balakrishnan claimed trial and their case was fixed for mention on 24 January 1980. When their case came up for hearing the learned Magistrate subsequently took the view that he had no jurisdiction to try an offence under s. 392 & 397 of the Penal Code and ordered both the accused to be produced and dealt with by the President of the Session Court, Melaka. Strangely enough he made no order or took no steps to remedy the situation in respect of the 1st accused. The learned President of the Sessions Court, however, held a differing view - hence this reference to the High Court for any possible order of revision.

The criminal jurisdiction of a 1st Class Magistrate, as specified in the Subordinate Courts Act, was originally confined to offences punishable:

(i) with any term of imprisonment not exceeding 5 years; or

(ii) with fine only; or

(iii) under ss. 325, 380, 381, 407, 408, 429, 431, 432, 435, 451, 452, 454 & 457 of the Penal Code.

By an amendment, *vide* Act A434/78 effective from 1 July 1978, the new s. 85 gave jurisdiction to Magistrates to try all offences for which the maximum term of imprisonment provided does not exceed 10 years or offences punishable with fine only. The latest amendment, *vide* Act A459/79 effective from 1 October 1979, made a further addition to the list of two specific offences under the Penal Code.

The new s. 85, as amended now, provides for offences:

(i) for which the maximum term of imprisonment provided by law does not exceed 10 years; or

(ii) punishable with fine only - whatever be the amount; or

(iii) falling under ss. 392 & 457 of the Penal Code.

The effect of limbs (i) and (ii) above is to make all offences, whether they fall under the Penal Code or other statutes, triable by a Magistrate so long as the maximum term of imprisonment does not exceed 10 years or consist of fine only. The effect of (iii), however, is to bring two specific offences within the competence of a Magistrate to try. The difference between the first two limbs and the third is that in (i) and (ii) the measure for their application is based on the quantum of punishment, whereas in limb (iii) the criterion is on the specific type of offence an accused person is charged with.

The learned Magistrate's fears about his jurisdiction arose from the inclusion of s. 397 to the charge. He understandably felt that s. 85 of the Subordinate Courts Act merely gave him the jurisdiction to try an offence under s. 392 and he could not dispose of a charge where, besides s. 392, the accused is also charged under s. 397. The answer to the learned Magistrate's doubts will depend on two matters:

(i) Is s. 397 a substantive offence?

(ii) Will the effect of the increased punishment imported into s. 392 by s. 397 take away his jurisdiction to try the offence?

If answer to (i) above is in the affirmative, then he definitely does not possess the jurisdiction to hear the case and there is no need to consider the matter further. However, if the answer is in the negative, then we should proceed to consider point (ii) above. In my opinion, s. 397 is not a substantive offence and, when read with another section, serves merely as a rider to that offence and the effect of which is to enhance the maximum punishment. Under no circumstances can a person be charged under s. 397 alone. In this context I cannot do better than reproduce a passage from the editorial comment of [1946] MLJ 1xxxvii, a larger part of which has been cited with approval by the Federal Court in *Tan Chew Man v. Public Prosecutor* [1977] 2 MLJ 247:

> The third ground for the decision of the Court was that s. 397, when read with s. 392 or s. 393, creates separate and distinct offences from the offences prescribed by the two last mentioned sections. The point at issue is however whether s. 397 constitutes a separate offence in itself. We respectfully submit that it does not and that in fact s. 397 only provides for an additional punishment for the person or persons who at the time of committing or attempting to commit robbery are armed with or use deadly weapons or cause grievous hurt to any person or attempt to cause death or grievous hurt to any person.

The answer to point (i) above is clearly in the negative and so we proceed to consider the next point, i.e. whether the effect of the increased permissible punishment of the two sections read together will take away the jurisdiction of a Magistrate under s. 85 of the Subordinate Courts Act. I do not think so. As discussed earlier, although the first two limbs of s. 85 employ quantum of punishment as the jurisdictive determination of a Magistrate, the third limb, as provided by the 1979 amendment, identifies specific offences for such determination. The effect of this amendment is to make any offence under s. 392 triable by a Magistrate irrespective of the maximum permissible punishment, but subject of course to the limitation of sentence contained in s. 87 of the Act.

The position, as it stands now, is when a person is charged for an offence under s. 392 alone, he shall be ordinarily produced and tried before a Court of a Magistrate for which the Magistrate can only impose as punishment a prison term up to 5 years and a maximum fine of RM10,000 and where the offence is aggravated by circumstances mentioned in the second limb of s. 392 or s. 397 he can impose in addition up to 12 strokes of whipping.

As the proviso to s. 85 of the Subordinate Courts Act had been left out in the Amendment Act A434/78, a Magistrate no longer possess the power to transfer cases to the Sessions Court and I do not think he could have transferred it under s. 177 of the Criminal Procedure Code either, as there appears to be no cause for the learned Magistrate to hold that it is a case which ought to be tried by a Court of higher jurisdiction.

Accordingly, in exercise of my revisionary powers, I make the following orders: I confirm the conviction and sentence on Subramaniam s/o Sanasi (accused No. 1) and I order that the charges and records of proceedings of V. Balakrishnan s/o Veerasamy (accused No. 2) and Jayaraman s/o Balakrishnan (accused No. 3) be remitted to the learned Magistrate, Alor Gajah to be dealt with by him in accordance with the law.

Also found at [1983] 1 CLJ 40